

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 29 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Access Charge Reform)

Price Cap Performance Review)
for Local Exchange Carriers)

Transport Rate Structure and Pricing)

Usage of the Public Switched Network by)
Information Service and Internet Access)
Providers)

CC Docket No. 96-262

CC Docket No. 94-1

CC Docket No. 91-213

CC Docket No. 96-263

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Federal Communications Commission
Office of Secretary

COMMENTS OF ICG TELECOM GROUP, INC.

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TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	ii
I. THE TEST FOR POTENTIAL COMPETITION MUST AT LEAST SATISFY THE STATUTE, AND ACTUAL COMPETITION IS THE APPROPRIATE TEST FOR PROPERLY SEQUENCED REGULATORY RELIEF	2
A. The Commission's Competitive Experience	2
B. The Commission's Proposals	4
C. The Framework For Assessing Potential Competition	6
D. The Commission's Proposals Fall Short Of The Framework	9
E. The Commission's Competitive Experience And Exchange Access Competition: The Need For The Presence Of Actual Competition	10
F. The Sequence Of Regulatory Relief	12
II. REDUCTIONS IN ACCESS CHARGES CAN BE PHASED IN CONSISTENT WITH A MARKET APPROACH	14
CONCLUSION	16

SUMMARY

The Commission's successful effort to create a competitive long distance market has useful lessons for the effort to bring the benefits of competition to the local exchange level. The Commission relaxed regulatory safeguards only when there was established competitors with strong measurable market positions to challenge the dominant carrier. The Commission must pursue a similar course to successfully bring competition to the local level. The Commission must (1) adopt policies which enhance the likelihood that competitors have low barriers to entry into the newly competitive markets, (2) monitor the development and stability of competition, and (3) relax regulatory constraints on incumbent LECs only when there is quantitative substantiation that competition has taken hold, and objective evidence that it is likely to endure.

The Commission has a ready available standard for assessing when a market is potentially competitive. The 1966 Act establishes specific requirements in Sections 251, 252, and 271. Furthermore, there are as yet no federal rates for expanded interconnection, and the Docket 91-141 tariff investigations remain unresolved. The statutory standards must, at a minimum, all be satisfied and there must be federal tariffs for expanded interconnection before there is competitive potential at the local exchange level.

The Commission is proposing to begin relaxing regulatory requirements, based on the presence of potential competition, in the access area even before the statutory standards are met by the ILECs. The *Notice* does not even mention the need for the Commission to conclude the *Expanded Interconnection* 91-141 proceeding before regulatory relief is

granted. It would be arbitrary for the Commission to relax regulation based on some hypothetical potential competition before the statutory standards are met and federal guidelines for expanded interconnection are fully developed.

In any event, the Commission's experience in bringing competition to interexchange markets shows that it is the presence of actual competition, not some theoretical conditions for competition, that is necessary before regulatory constraints can be relaxed. The Commission loosened regulatory constraints in the long distance market only after several carriers had built nationwide networks and were firmly established in the market and had demonstrated their ability to be viable competitors over a reasonable period of time.

The perceived difficulties of gathering market share and other data should not deter the Commission from requiring a reasonable level of measurable and perceivable competition before regulatory restraints are relaxed. The Commission already receives ample data from major LECs. ICG is willing, given proper assurances of confidentiality, to provide data concerning customer lines and access minutes, and believes that procedures can be developed to gather such data, under similar assurances of confidentiality, from carriers who do not currently report, so that the Commission can have aggregate data. The Commission cannot allow incumbent LECs pricing flexibility, affording them the opportunity to stifle incipient competition, before developing the methodology to determine whether competition even exists.

Regulatory relief that would allow ILECs pricing flexibility, such as individual case basis ("ICB") or deaveraged pricing can have a particularly pernicious effect on new competitors. It gives ILECs the ability to target offerings to undercut competition. It is particularly important that this relief not be granted until there is full competition and competitors can serve an ILEC's full service area.

The only way to achieve long term successful access charge reform is to stimulate competition in the exchange access market. Yet access charge reductions and the associated reductions in long distance rates should not necessarily have to await full blown competition.

ICG proposes that the Commission accomplish access reform through a four-year, across-the-board, phase-in of access reductions with the target of bringing access charges to cost. Across-the-board reductions will lower consumer prices without giving any LEC the flexibility to shift cost allocations in a manner to disadvantage competitors. At the same time, to the extent there has been under-recovery by the LECs, the LECs will have a four year period for continued recovery. This "hybrid" approach to access rate reduction can be accomplished even while the Commission does what it believes is necessary to reform the access charge rate structure.

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COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG"), through its undersigned counsel, hereby submits its comments on the issues identified in the *Notice of Proposed Rulemaking* portion of this docket. *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, FCC 96-488, ¶¶ 50-299 (released December 24, 1996) ("Notice"). ICG is the third largest facilities-based competitive local exchange company ("CLEC") and operates in 22 states.

In the *Notice*, the Commission requests comments, *inter alia*, on rate structure rule changes for common line, local switching, and transport; on proposals for phasing out the transport interconnection charge ("TIC"); and on establishing rate structure rules for SS7 signaling services. Except for the transport rule revisions and the revisions to the TIC, the Commission proposes applying the rate structure rule changes only to price cap incumbent

local exchange companies ("ILECs"), promising to address rate structure revisions for non-price cap incumbent LECs in a separate proceeding. Subparts D and E of Part 69 of the FCC rules allocate incumbent LECs' investment and expenses to all the access rate elements. The Commission invites comment on whether to relieve price cap ILECs from the requirements of Subparts D and E, and if so, what the timing of that relief should be. As for specific recommendations for rate restructuring, ICG associates itself with the comments filed by the Association for Local Telecommunications Services ("ALTS") and joins generally in those comments. ICG's comments will address the necessary preconditions to affording pricing flexibility to incumbent LECs and related issues of universal service and cost recovery.

I. THE TEST FOR POTENTIAL COMPETITION MUST AT LEAST SATISFY THE STATUTE, AND ACTUAL COMPETITION IS THE APPROPRIATE TEST FOR PROPERLY SEQUENCED REGULATORY RELIEF

A. The Commission's Competitive Experience

The Commission's initiative to develop a framework for access reform is both timely and essential. Over the past decade the Commission has managed the successful transition to full and effective competition in the interexchange market. This was accomplished by balancing the interests of the former monopoly provider, AT&T, against those of the multitude of new entrants into the market. The Commission's objective was to ensure that residential and business customers enjoy steadily declining prices and an ever increasing menu of new and improved services. The Commission achieved its goals by restricting

AT&T's ability to take advantage of its market dominance or otherwise engage in many anticompetitive practices, such as discriminatory pricing. Only when the Commission was satisfied that competitors had equal access to consumers, that consumers were aware of and were exercising their options in the marketplace, and that competitors had sufficient facilities, capacity and market share to ensure continued viability did the Commission loosen the dominant carrier's competitive shackles. AT&T was not relieved of its regulatory burdens as the dominant interexchange carrier until 1995, nearly twelve years after long distance competition was accelerated by the divestiture of the Bell System.¹

Just as divestiture provided the catalyst for competition in the interexchange market, the Telecommunications Act of 1996² ("1996 Act") holds the potential for a similar future for local exchange and interstate exchange access markets. At a broad level, the Act encourages competitors to enter these monopoly controlled markets by creating a right to interconnect to the incumbent LECs' networks at cost-based rates, to obtain unbundled network elements at cost-based rates, and to obtain most services from the ILECs at a wholesale discount.³ The Act also prescribes a number of more detailed measures designed to increase competition in these markets;⁴ these measures are detailed below. The Commission emphasizes in the *Notice* that its goal is to fulfill the Act's promise of interstate

¹ *In the Matter of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCCR 3271 (1995).

² Pub. L. No. 104-104, 110 Stat. 56, *to be codified* at 47 U.S.C. § 151 *et seq.*

³ *See, e.g.*, 47 U.S.C. § 251(c)(4).

⁴ 47 U.S.C. §§ 251(b)(5), (c)(2), and (c)(3); § 252(d).

exchange access competition: "Our overriding goal in this proceeding is to adopt revisions to our access charge rules that will foster competition for these services and eventually enable marketplace forces to eliminate the need for price regulation of these services."⁵

The interstate exchange access market is at a nascent stage of competition, so soon after the enactment of the 1996 Act, comparable to interexchange services soon after divestiture. Just as it was essential to ensure the viability of AT&T's fledgling competitors, the Commission must do more than simply establish "neutral" ground rules and allow the dominant ILECs free reign with their emerging competitors who must rely on the ILECs for vital inputs. As the Commission's experience in the interexchange market shows, forging a competitive market out of a monopoly environment requires affirmative steps to establish pro-competitive ground rules, nurture competition, and to ensure that competition and competitors are viable; only then, should the Commission stand aside and allow the most efficient competitor to prevail. The Commission must: (1) adopt policies which eliminate barriers to entry into the newly competitive markets, (2) monitor the development and stability of competition, and (3) relax regulatory constraints on incumbent LECs only when there is quantitative substantiation that competition has taken hold, and objective evidence that it is likely to endure.

⁵ *Notice*, ¶ 140. See also ¶ 149.

B. The Commission's Proposals

The Commission proposes to eliminate four regulatory constraints when an incumbent LEC can demonstrate that it faces potential competition for interstate access services in specific geographic areas. The LEC would pass its "Phase 1" test, and be deemed to face potential competition, upon a showing that "some or all of the following conditions exist:"⁶

- Unbundled network element prices are based on geographically deaveraged, forward-looking economic costs in a manner that reflects the way costs are incurred;
- Transport and termination charges are based on the additional cost of transporting and terminating another carrier's traffic;
- Wholesale prices for retail services are based on reasonably avoidable costs;
- Network elements and services are capable of being provisioned rapidly and consistent with a significant level of demand;
- Dialing parity and number portability are provided by the incumbent LEC to competitors;
- Access to incumbent LEC rights-of-way is provided to competitors; and
- Open and non-discriminatory network standards and protocols are put into effect.

Upon a finding that the LEC has passed its Phase 1 test, the following constraints would be lifted: the prohibition against geographic deaveraging within a study area, restrictions on volume and term discounts for interstate access services, the prohibition against contract

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Id., ¶ 163.

tariffs and individual request for proposals (“RFP”) responses, and restraints on the ability of incumbent LECs to offer new, innovative access services.⁷

The LEC enters Phase 2, “actual competition,” upon a (1) demonstrated presence of competition; (2) full implementation of competitively neutral universal service support mechanisms; and (3) credible and timely enforcement of pro-competitive rules.⁸ Once actual competition is achieved, the Commission proposes to lift further constraints on the LEC:

- Eliminating price cap service categories within baskets;
- Removing the ban on differential pricing for access among different classes of customers;
- Ending mandatory rate structure rules for transport and local switching; and
- Consolidating traffic-sensitive and trunking baskets.⁹

C. The Framework For Assessing Potential Competition

The Commission has a ready framework for assessing competitive potential at the local exchange level. The starting point for the framework for determining competitive potential at the local level is the 1966 Act. Section 251(b) imposes on all LECs the requirements to provide resale of services; number portability; dialing parity to competing providers of exchange and toll services without unreasonable dialing delays; access to telephone numbers, operator services, directory assistance and directory listings; access to

⁷ *Id.*, ¶ 168.

⁸ *Id.*, ¶ 164, ¶ 202.

⁹ *Id.*, ¶ 201.

poles, ducts, conduits and to rights-of-way to competing providers; and to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Section 251(c) imposes additional obligations on an incumbent LEC:

- The duty to negotiate in good faith the implementation of the requirements of Section 251(b), described above, and the procedures in Section 252 for the negotiation, arbitration, and approval of agreements with other LECs and interexchange carriers ("IXCs") to implement requirements of the Act;
- The duty to provide interconnection to its network on just and reasonable terms and rates;
- The duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on just and reasonable terms and rates;
- The duty to offer its services at wholesale rates to other carriers for resale without imposing unreasonable or discriminatory conditions or limitations on such resale;
- The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services over the incumbent LEC's network; and
- The duty to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises unless physical collocation can be shown to be impractical for technical or space reasons.

The Act also provides a checklist in Section 271(c)(2)(B) to examine whether a Bell Operating Company ("BOC") has provided an acceptable level of access and interconnection. While the checklist applies nominally to the BOCs, it provides insight as

to Congress' perception as to minimum preconditions for a competitive environment. This

checklist includes:

- Interconnection and nondiscriminatory access to network elements, poles, ducts, conduits, and rights-of-way, reciprocal compensation arrangements, and services available for resale, in compliance with Sections 251 and 252;
- Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services;
- Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;
- Local switching unbundled from transport, local loop transmission, or other services;
- Nondiscriminatory access to 911 and E911 services, directory assistance services for exchange competitors' customers, and operator call completion services;
- White pages directory listings for exchange competitors' customers;
- Nondiscriminatory access to telephone numbers for assignment to exchange competitors' customers;
- Nondiscriminatory access to data bases and associated signaling necessary for call routing and completion;
- Interim, then full number portability; and
- Nondiscriminatory access to such services or information as are necessary to allow exchange competitors to implement dialing parity.

Another essential precondition to exchange and exchange access competition is the establishment of reasonable rates for colocation. The Commission undertook to open the

access services market to competition in Docket No. 91-141.¹⁰ The goal of this docket was to provide physical or virtual collocation to the LEC networks for competitive access providers. While the Commission has established the framework for expanded interconnection,¹¹ the tariffs necessary to implement the new regime remain under investigation. And even after passage of the 1966 Act, the rates under investigation continue to form the basis of the rates currently being charged for collocation under negotiated agreements. In fact, many ILECs simply rely on the tariffed rates, terms and conditions still under investigation and will not further negotiate collocation rates despite passage of the Act. Therefore, six years after the initiation of this proceeding, and nearly three years after the Commission determined that expanded interconnection in both the special and switched access markets was in the public interest, competitive access providers remain captive to the LECs' monopoly pricing. Until tariffs are in place to ensure just and reasonable rates for collocation, it cannot be said that there is even the potential for fair competition for exchange access services.

D. The Commission's Proposals Fall Short Of The Framework

The existence of competitive potential within a particular local exchange market cannot be met until an incumbent LEC meets all of the prerequisites of Sections 251, 252 and the checklist under Section 271 of the 1996 Act. The criteria contained in all three

¹⁰ *Notice of Proposed Rulemaking and Notice of Inquiry*, 6 F.C.C.R. 3259 (1991).

¹¹ *Memorandum Opinion and Order*, 9 F.C.C.R. 5154 (1994).

sections should be applied to all ILECs; these criteria are the benchmark for competition, and Section 271 is only incidentally related to RBOC entry into in-region interLATA because of historical circumstance. The Commission's Phase 1 triggers exclude several critical provisions required under the Act. Among these are access to telephone numbers; access to operator services; access to directory assistance; access to directory listings; interconnection on just and reasonable rates; access to unbundled elements at any technically feasible point; and physical colocation. An incumbent LEC's satisfaction of the Phase 1 triggers merely indicates that some conditions exist which might induce competitors to enter the market. Further, nowhere does the *Notice* speak to the Commission's commitment to resolving the *Expanded Interconnection*, Docket 91-141 proceeding before an ILEC can meet the test for relaxed regulations.

In short, the *Notice's* proposals falls short of meeting the standard set by the Act and the Commission's own standard for relaxed regulation. It would be incongruous and arbitrary for the Commission to pronounce relaxed regulation for ILECs before all the statutory criteria are met and before the issues and rates in *Expanded Interconnection* have been addressed. The Commission's proposal would lift regulatory constraints before the incumbent LEC demonstrates that these conditions for competition are met.

E. The Commission's Competitive Experience And Exchange Access Competition: The Need For The Presence Of Actual Competition

The Commission's proposal for access reform differs markedly from the model used by the Commission to open the interexchange market. There the Commission loosened

pricing restraints on AT&T only after several facilities based carriers had built nationwide networks with capacity to handle all of AT&T's traffic, after hundreds of non-facilities based competitors had entered the market, after competitors had attracted significant market share in both the residential and business markets, and after the Commission was satisfied that consumers had become painfully aware of their options and were freely exercising those options. Only when these conditions exist in the exchange access arena should incumbent LECs have the freedom suggested by the Commission in Phase 1. Premature relief to the incumbents will deter potential new entrants and will complicate their ability to raise capital. It will also retard the growth of the existing competitive LEC industry by permitting the dominant market leaders to use their immense market power to eliminate competitors' principal differentiating factor -- price. Granting the incumbent monopoly provider significant pricing flexibility before new entrants have demonstrated the ability to be viable competitors over a reasonable period of time would be improvident.

ICG does not suggest that the timeframe for lifting the constraints proposed in the Act, Phase 1, and Phase 2 should necessarily equate to the twelve year period between divestiture and AT&T's relief from dominant carrier regulation. Indeed, the Commission anticipates "...that at least some incumbent LECs reasonably should be able to satisfy these [Phase 1] conditions during 1997."¹² At the same time, however, the Commission confesses that, "...we lack data on the relative market shares of incumbent LECs and their rivals, and thus need to develop reasonable and nonburdensome ways to gather that

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Id., ¶ 163.

information if we were to rely on it.”¹³ It would be inconceivable for The incumbent LECs retain monopoly control of their markets. Data to be submitted by ALTS shows their market share remains above 97% and, with rare exceptions, the ILEC remains the only carrier to offer dial tone to every customer within most geographic areas. Therefore, for the foreseeable future, competitive exchange access providers will remain dependent upon the incumbent LEC to reach most, if not all, of the competitors' customers.

ICG recognizes the difficulty in establishing accurate market share levels for competitors in the thousands of exchange markets throughout the country. However, the Commission already receives ample data from major LECs, reported in *Statistics of Common Carriers*. ICG is willing, given proper assurances of confidentiality, to provide data concerning customer lines and access minutes, and believes that procedures can be developed to gather such data from carriers who do not currently report, so that the Commission can have data aggregated at the local, state, regional, and national level.

The burden should be placed on the LEC to petition for a declaratory ruling that a particular geographic area is subject to competition in all exchange and exchange access services. The incumbent LEC will then bear the burden of proving that such competition exists beyond the mere recital of a few anecdotes about particular customers who have given some of their business to a CLEC.

The demonstration of actual competition will vary from market to market, although similar market penetration patterns should be observed in markets of similar size and

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Id., ¶ 203.

demographics. ICG does not propose that a LEC be compelled to demonstrate the loss of a minimum percentage of market share. However, the Commission must be satisfied that all of the other preconditions have been met, and that data submitted by the incumbent LEC and other carriers in the relevant market demonstrate significant market penetration by competitors, stability of the competitors, and consumers' awareness of the competitive alternatives in the local market.

F. The Sequence Of Regulatory Relief

ICG submits that it is particularly important for the Commission to insist on the demonstrated presence of competition before the Commission grants regulatory relief. Unlike the early IXC competitors, CLECs have not sought or been given reduced interconnection charges or any other advantageous or preferential treatment.¹⁴ In fact, the reverse is true. While IXCs has the benefit of discounted access, CLECs continue to be charged collocation rates that have not yet been determined to be reasonable. The need for a balance of competition and the need for the correct timing and sequencing of regulatory relief accorded the ILECs is particularly acute.

One of the most important regulatory safeguards is the requirement for nondiscriminatory pricing. Thus, regulatory relief that has discriminatory and anticompetitive potential, such as individual case basis ("ICB") pricing and other contract

¹⁴ *In the Matter of Exchange Network Facilities for Interstate Access ("ENFLA"), Memorandum Opinion and Order, 71 FCC 2d 440 (1979).*

authority should come only once there are clearly measurable competitive conditions and competitors in a market.

This brings into question the Commission's proposal to provide pricing relief to incumbent LECs on a service-by-service basis.¹⁵ To the extent that an incumbent LEC remains the only provider for all exchange and exchange access services in a geographic area, it is in a position to recover a disproportionate share of shared and common costs from those consumers who do not have competitive alternatives. With pricing flexibility for services deemed competitive, the ILEC then has the advantage of imposing a price squeeze on competitors who have no ability to shift costs. Thus, an incumbent LEC should not receive pricing flexibility unless it faces actual competition, and the market is one in which the ILEC faces competition for all exchange and exchange access services, by either facilities-based or resale carriers. Geographic deaveraging before there is full competition and competitors can serve all parts of the ILEC's service area raises similar concerns. Yet the Commission proposes to give pricing flexibility as part of "Phase I" relief before even the full conditions for competitive potential (as discussed in Section I(D)) have been met. ILEC pricing flexibility should be allowed only after a demonstration of full competition for local exchange service.

The ability to price discriminate and to target selectively competitive markets is an enormous deterrent to competitive entry. The authority to engage in these practices was not granted to AT&T until after competitors were firmly established in 1989. Yet ultimately, as the Commission recognized, competitive exchange access service providers

¹⁵ *Notice*, ¶ 205.

are the only way to achieve true access reform.¹⁶ ICG agrees with this observation, and ICG believes that one of the most effective steps the Commission must take to encourage this competition is to ensure that competitive safeguards will not be eroded. This is the "market approach" most conducive to long run market-based competition.

**II. REDUCTIONS IN ACCESS CHARGES CAN BE PHASED
IN CONSISTENT WITH A MARKET APPROACH**

If either access reform or access rate reductions is implemented in a manner that allows incumbent LECs to discourage new entrants, or to gain unfair pricing advantages over fledgling competitors, the goal of the 1996 Act and the Commission -- to facilitate competition in the exchange and exchange access markets -- cannot be fulfilled. As the discussion in Section I makes clear, access reform should be addressed only in the context of constructing the framework for full facilities-based and resale competition for exchange access services. If the premature reductions in access charges provide the incumbent LECs the pricing flexibility they need to discourage new entrants and to undercut competitors who have not yet had an appreciable impact on the local market, the Commission will fail to secure the promise of exchange access competition. In the absence of competition, the incumbents will have no incentive to improve efficiency or productivity.

In the long run, consumers will see higher prices than they would in a competitive environment, and investments in the local exchange and exchange access infrastructure will be made at a much slower pace than if driven by competitive necessity. Again the interexchange market experience provides a useful model. Immediately after divestiture,

¹⁶ See Notice ¶ 140.

several new entrants constructed nationwide networks, and soon upgraded them with fiber. This competitive threat forced AT&T to accelerate its previously announced deployment of fiber. The interexchange carriers have continued to modernize their networks, and the result has been steadily lower prices to consumers.

At the same time, it will take some time for exchange access competition to develop, and for competition to bring the benefits of lower access charges. Yet the practicalities are that neither Congress, the IXCs, nor the public may be willing to wait for exchange access competition to bring a reduction in long distance rates for consumers. Nor should they have to wait so long for such a benefit given the high level of access charges.

As consumers will be the ultimate beneficiaries of access reductions, provided that exchange access competition is not impaired, ICG supports the implementation of an access charge mechanism that lowers consumer prices without harming competition or universal service. ICG proposes that the Commission accomplish access reform through a four-year, across-the-board, phase-in of access reductions with the target of bringing access charges to cost. Consumers will likely see immediate rate reductions in long distance rates; price competition in the interexchange market is such that most of the access reductions will flow through to consumers. Across-the-board reductions will lower consumer prices without giving any LEC the flexibility to cross-subsidize in a manner to disadvantage competitors. At the same time, to the extent there has been under-recovery by the ILECs, the ILECs will have a four year period of continued capital recovery and for the ILEC and investor community to adjust. ICG believes that this "hybrid" approach to access rate

reduction can be accomplished even while the Commission does what it believes is necessary to reform the access charge rate structure.¹⁷

CONCLUSION

The Commission's overriding goal should be to ensure that all the preconditions for exchange and exchange access competition are effectuated as soon as possible. The same diligence that the Commission demonstrated in managing the opening of the interexchange market will be needed to open the local markets. Even more patience will be required because the incumbent LECs' domination in the local markets is even greater than AT&T enjoyed in the long distance market, because of the LECs' unique relationship with each customer. Competition may not necessarily be measured by the dominant carriers' loss of market share, as it was in the interexchange market, but by the degree to which competitors are able to differentiate their offerings and convince large users that diversification of telecommunications providers is in their corporate interests. With corporate users as a base, growth will come through new services and normal growth in the economy and the telecommunications industry.

Actual competition will be demonstrated when large users routinely use competitive access carriers for a portion of their traffic, when the CLECs' share of this traffic shows steady growth for a reasonable period of time, and upon a showing that residential users are aware of and take advantage of competitive alternatives in the local market. While the incumbent LEC may retain substantial market share because of its unique access to every

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As note above, ICG supports the rate structure approach advanced by ALTS.

customer, the Commission must find that there is a measurable, consistent growth in CLECs' minutes and revenues in a local market before it can loosen regulatory controls on the incumbent.

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